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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

SEARS, ROEBUCK & COMPANY,
Petitioner,

v.

LOUIS J. BARATTINI, JR.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICI CURIAE* OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF THE PETITION

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INTERESTS OF AMICI CURIAE

The Product Liability Advisory Council, Inc., is an association of industrial companies formed for the purpose of submitting *amicus curiae* briefs in appellate cases involving significant issues affecting the law of product liability. Its members include about 100 major manufacturers and 300 defense attorneys.

The National Association of Manufacturers of the United States of America ("NAM") is a non-profit voluntary business association representing more than 12,000 companies throughout the United States. NAM is affili-

ated with an additional 128,000 businesses through the National Industrial Council and the NAM Associations Council. NAM members are defendants in cases nationwide and are interested in the fair administration of justice, which includes the right to seek diversity jurisdiction in appropriate circumstances.

Amici file this brief to alert the Court to the broad significance this case has to all manufacturer defendants.[1] The petition raises an issue at the very core of a defendant's right to seek the protection of an impartial federal forum in cases arising under the federal courts' diversity jurisdiction. Such jurisdiction was initially conceived as a safe harbor for out-of-state defendants to avoid the "state prejudices, state jealousies, and state interests" inherent in defending an action brought by a resident plaintiff in state court. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816). The decision below threatens to undermine this fundamental right by depriving the federal courts of their ability to ferret out the fraudulent practice of joining non-diverse defendants solely for the purpose of destroying federal jurisdiction. Indeed, if the Fifth Circuit's "strict view of fraudulent joinder" is permitted to stand, the right of out-of-state defendants to have their cases heard before a neutral federal forum may well become a virtual nullity, easily defeated by plaintiffs' artful pleading and sharp practices.

Amici, representing those who develop, manufacture and sell consumer products in this country, have a particularly strong interest in maintaining the integrity of federal diversity jurisdiction. Routinely hailed into state courts by resident plaintiffs, product manufacturers often face the unattractive prospect of being the out-of-state defendant facing a "home-town" plaintiff. Historically, a defendant's ability to remove such disputes to an impar-

[1] Pursuant to this Court's Rule 37.2, letters of consent have been filed with the Clerk.

tial federal court has been one of the few mechanisms available to it for "levelling the playing field." However, unless a federal court is empowered to distinguish between "real" and "fraudulent" diversity cases, meaningful access to the federal courts will be dramatically impaired.

Because the decision below threatens the foundations of federal removal practice, review by this Court is warranted. *Amici* urge the Court to grant the petition, to reaffirm its early holdings on the proper scope of the fraudulent joinder doctrine, and in so doing, to reaffirm the viability of diversity jurisdiction and the important protections which it offers the non-resident defendant.

REASONS FOR GRANTING THE PETITION

Beyond presenting a substantial federal question over which the lower courts are divided, the petition raises an issue of overriding concern to the American business community, for it involves the basic procedural right out-of-state defendants have long enjoyed in our judicial system to have claims asserted against them heard in a neutral federal forum. Departing from this Court's precedents, the decision below announces a new "fraudulent joinder" standard that vitiates this basic right by permitting a plaintiff to destroy diversity jurisdiction through the artifice of naming as a "defendant" a non-diverse party against whom the plaintiff has *no* intention of pursuing a claim. The practical effect of such a rule is to invite plaintiffs throughout the country to join non-diverse defendants *solely* for the purpose of defeating federal jurisdiction, resting secure in the knowledge that the federal courts would, under this standard, be *barred* from considering even clear and convincing evidence of fraudulent joinder. Because the decision below is inconsistent with this Court's prior cases, creates a conflict within the circuit courts of appeal as to a basic question of federal jurisdiction, and is of far-reaching practical

consequence to litigants who routinely find themselves in our Nation's courts, *amici* respectfully urge the Court to grant the petition.

A. An out-of-state defendant (particularly a "deep pocket" manufacturer or other business entity) defending itself in state court against the serious personal injury claims of a local resident can present an ideal opportunity for a plaintiff and his lawyer. Not only may the local court be familiar terrain to plaintiff's counsel, often affording certain perceived procedural advantages over federal court, but many times the plaintiff will hope to take advantage of the sympathies of a local judge, who is frequently subject to popular electoral control. It is a simple fact of life that when in-state plaintiffs sue out-of-state defendants in state court, both political and practical forces have a tendency to tilt judgments toward the resident plaintiffs. As one sitting state supreme court justice recently acknowledged:

> Indeed, in some world other than the one in which we live, where this Court were called upon to make national policy, we might very well take a meat ax to some current product liability rules. Therefore, we do not claim that our adoption of rules liberal to plaintiffs comports, necessarily, with some Platonic ideal of perfect justice. Rather, for a tiny state incapable of controlling the direction of national law in terms of appropriate trade-offs among employment, research, development and compensation for injured users of products, the adoption of rules liberal to plaintiffs is simply self defense.

Blankenship v. General Motors Corp., 406 S.E.2d 781, 786 (W. Va. 1991). Though these comments were in context directed at the inclination of some state courts to fashion "pro-plaintiff" substantive law, the observation applies equally to procedural rights such as the right to remove to a federal forum. One need look no further than to the transparent gamesmanship of the respondent in this case for confirmation that state court is sometimes perceived

by both defendants and plaintiffs alike to offer an advantage to local plaintiffs when the defendant is from out-of-state.

Since the First Judiciary Act of 1789, removal to a federal court is the out-of-state defendant's recourse when faced with such a prospect. The right to remove to an impartial federal forum enables the defendant to impose some limited control in those cases where the potential for local prejudice and bias is perceived to be the greatest. As Justice Marshall observed long ago, in explaining the rationale for federal court diversity jurisdiction:

> However true the fact may be, that the tribunals of the states will administer justice as impartially as those of the nation, to parties of every description, it is not less true that the Constitution itself either entertains apprehensions on this subject, or views with such indulgence the possible fears and apprehensions of suitors, that it has established national tribunals for the decision of controversies between aliens and a citizen, or between citizens of different states.

Bank of the United States v. Deveaux, 9 U.S. (5 Cranch) 61, 87 (1809).

B. That the decision below threatens to undo the important protections of federal removal and remand practice is aptly illustrated by the facts of this case. Here, the plaintiff sought to circumvent the diversity jurisdiction of the federal court by naming as a "defendant" a fellow citizen of Louisiana (Soileau) against whom he had no intention of pursuing a claim, but as to whom his lawyer could nevertheless manufacture a theory of liability. That plaintiff's joinder of Soileau was fraudulent is essentially undisputed. Solieau admitted under oath that plaintiff told him "not to worry" about the suit because he had no intention of pursuing the claim against him. Plaintiff made good on the promise by never attempting to prosecute the "claim": though Soileau never answered the complaint, plaintiff declined to move for a default judgment or to otherwise press his claim.

Soileau's sole function as a named party was to ensure a state court forum. And, as soon as the recently enacted one-year limitation on removal elapsed (*see* 28 U.S.C. § 1446(b)), plaintiff provided confirmation of his fraudulent intent by voluntarily dismissing Soileau from the suit.

Although the fraud committed on the district court here was established by clear and convincing evidence, the Fifth Circuit held this to be *irrelevant*. The only germane inquiry, according to the lower court's decision, is whether it is "possible" that the allegations against Soileau might have stated a cause of action under applicable law. Never mind that no actual "case or controversy" existed between the parties. As the petition demonstrates, by refusing to consider this undisputed evidence of actual fraud, the Fifth Circuit has ignored this Court's fraudulent joinder cases. They hold squarely that the "right of removal cannot be defeated by a fraudulent joinder of a resident defendant having no real connection with the controversy." *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97 (1921). *See also Chesapeake & Ohio Ry. v. Cockrell*, 232 U.S. 146, 152 (1914). These cases also teach that "[f]ederal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right. . . ." *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 186 (1907).

Yet, by disregarding respondent's blatant manipulation of the judicial system, the Fifth Circuit has done exactly this: it has eviscerated a defendant's statutory right of removal, and with it a meaningful right of access to the federal courts, in a large category of cases. The reality of today's product liability laws, and the usual fact patterns to which they are applied, is that unprincipled plaintiff attorneys will usually be able to concoct some conceivable claim, however farfetched, against an in-state "sham defendant." In the workplace, there are always resident coworkers who can be named; within the stream

of commerce, there is likewise inevitably a resident manufacturer, supplier, distributor, or somebody's agent to serve as a "dummy" defendant. Without a mechanism for checking this abuse, the result for defendants is that, in many cases, diversity jurisdiction and the protections it offers will become a thing of the past.

C. The Fifth Circuit's proposed fraudulent joinder standard—which permits "feigned claims" against "phantom defendants" to destroy federal court jurisdiction—is also fundamentally at odds with this Court's cases holding that collusive lawsuits are not actual "cases or controversies" for purposes of evaluating Article III jurisdiction. If, for example, the plaintiff and defendant in this case had concocted a sham arrangement for the purpose of *creating* federal court jurisdiction, it is clear that the court below would have been required to dismiss the suit for want of a case or controversy. 28 U.S.C. § 1359 ("A district court will not have jurisdiction of a civil action in which any party . . . has been improperly or collusively made or joined to invoke the jurisdiction of such court."); *see Smith v. Sperling*, 354 U.S. 91, 97 (1957) ("collusion to satisfy the jurisdictional requirements . . . will always defeat jurisdiction"). Just as clearly, a party ought not be permitted to *rob* a federal court of jurisdiction based on the assertion of an entirely fictitious claim. A "claim" which a plaintiff never intends to pursue is no claim at all. In evaluating its jurisdiction, the district court ought to determine what *actual* parties and what *actual* claims are before it and, in so doing, should disregard a "defendant" and a "claim" that are present in a lawsuit *exclusively* for the purpose of defeating jurisdiction. By contrast, the effect of the decision below is to elevate form over substance by requiring the district courts to consider only the theoretical viability of a cause of action, while blinding themselves to uncontradicted evidence of actual fraud.[2]

[2] Over time, this Court has consistently protected diversity jurisdiction from artificial enlargement *or* restriction precisely

D. The manifest incorrectness of the lower court's decision on an important question of federal jurisdiction is but one of the grounds for granting the petition. Of equal concern to *amici* is the conflict created by the Fifth Circuit's decision with the law of other circuits (*see* Pet. 10-12) and the potential confusion this will cause for defendants who are regularly subject to lawsuits in multiple jurisdictions. Left undisturbed, the decision below creates a situation in which a defendant's right to remove a case to federal court—and to stay there by being able to prove fraudulent joinder in egregious cases like this one—will turn solely on *where* the plaintiff initially sues. For defendants like *amici*, with nationwide operations and distribution networks, it is difficult enough to contend with the existing "patchwork quilt" of substantive state product liability law, without also having to face inconsistency in the application of a basic federal procedural right. While the former problem is plainly an issue for Congress to address, it is for this Court to ensure that

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like that sanctioned by the Fifth Circuit here. "The duties of this Court, to exercise jurisdiction where it is conferred, and not to usurp it, where it is not conferred, are of equal obligation." *Devaux*, 9 U.S. at 87. *See also Wecker*, 204 U.S. at 186. For example, parties may not create or destroy diversity jurisdiction by the artificial alignment of the parties; the court will go beyond the face of a complaint to realign parties according to their true interests, whether the result is to create or defeat jurisdiction. *See, e.g., City of Indianapolis v. Chase Nat'l Bank*, 314 U.S. 63, 69 (1941) ("Litigation is the pursuit of practical ends, not a game of chess. Whether the necessary 'collision of interests' exists, is therefore not to be determined by mechanical rules. It must be ascertained from the 'principal purpose of the suit.'"). *See also Pacific R.R. v. Ketchum*, 101 U.S. 289, 298 (1879). Likewise, diversity jurisdiction cannot be destroyed by manipulation of the *ad damnum*. *St. Paul Mercury Indem. Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) ("If the plaintiff could . . . reduce the amount of his demand to defeat federal jurisdiction the defendant's supposed statutory right of removal would be subject to the plaintiff's caprice."). Indeed, even the Fifth Circuit will not permit a plaintiff to destroy diversity jurisdiction by adding a defendant against whom recovery is not possible under the facts. Pet. App. 8a.

"[t]he removal statute, which is nationwide in its operation, [ ] be uniform in its application." *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 104 (1941). For this additional reason, guidance from this Court is warranted here.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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